2010

Claudia Orr, Eugene Orr, on behalf of their deceased son, Kevin Orr, Holly Orr v. Uintah County, State of Utah : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

CLAUDIA ORR and EUGENE ORR, individually, on behalf of their deceased son, KEVIN ORR, HOLLY ORR, individually and on behalf of the estate and heirs of KEVIN ORR, Plaintiffs and Appellants, v. UINTAH COUNTY, STATE OF UTAH, Defendant and Appellee.	Appellate Case No. 20100373 Eighth District Court Case No. 090800834 (Transferred from Third District Court Case No. 080923329)

BRIEF OF APPELLEE UINTAH COUNTY, UTAH

On appeal from an order and final judgment of the Eighth Judicial District Court in and for Uintah County, the honorable A. Lynn Payne, District Court Judge

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code section 78A-4-103(b)(j) and *Rule* 42 of the *Utah Rules of Appellate Procedure*. The Utah Supreme Court's May 11, 2010 *Order* transferred this case to the Utah Court of Appeals. ®. *at 536*).

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

Issue: The issue is whether the District Court erred by granting Uintah County's *Motion to Dismiss* pursuant to rule 12(b)(6) of the *Utah Rules of Civil Procedure*.

Standard of Review: "A district court's grant of a motion to dismiss based upon the allegations in the plaintiff's complaint presents a question of law that [this Court] review[s] for correctness." *Osguthorpe v. Wolf Mt. Resorts, L.C.*, 2010 UT 29, ¶ 10, 232 P.3d 999 (internal quotations omitted). Further, when reviewing a rule 12(b)(6) dismissal, this Court must "accept the plaintiff's description of facts alleged in the complaint to be true, but [it] need not accept extrinsic facts not pleaded nor need [it] accept legal conclusions in contradiction of the pleaded facts." *Id.* (internal quotations omitted). In addition, "it is well established that an appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record, even if it differs from that stated by the trial court." *Id.* (internal quotations omitted).

Preservation: Plaintiffs identify their *Memorandum in Opposition to Uintah County's Motion to Dismiss* in support of their claim that this issue is preserved.

However, contrary to Plaintiffs' briefing, their *Memorandum in Opposition* is not attached to their brief or in their *Addendum*. For the convenience of the Court, Plaintiffs' *Memorandum in Opposition* may be found at pages 223 to 244 in the record.

STATEMENT OF THE CASE

This case arises out of the death of Detective Kevin Orr of the Uintah County Sheriff's Office. Detective Orr was killed in a helicopter crash while on a search and rescue mission. The helicopter was owned by Pete Martin Drilling, Inc., and/or Rat Air, Inc. The pilot, a Pete Martin Drilling, Inc. employee, was Brian Grayson.

Plaintiffs commenced the instant action in the Third Judicial District Court in and for Salt Lake County, Utah on November 4, 2008 (Case no. 0809233329) ("*Orr II*"). ®. *at 4*). On October 5, 2009, the Third Judicial District Court transferred this action to the Eighth Judicial District Court for Uintah County, and the matter received a new case number (090800834). ®. *at 185-86*). Plaintiffs' *Complaint* essentially seeks a declaratory judgment defining which Defendants may be liable for the helicopter crash, namely Uintah County or Pete Martin Drilling, Inc., Rat Air, Inc. and Brian Grayson. The gravamen of Plaintiffs' *Complaint* asks whether Pete Martin Drilling, Inc., Rat Air, Inc. and Brian Grayson (collectively, the "Helicopter Defendants") were acting as volunteers for Uintah County at the time of the accident and are therefore covered by the *Volunteer Government Worker's Act* (Utah Code section 67-20-1 *et seq.*) and the *Immunity for Persons Performing Voluntary Service Act* (Utah Code section 63G-8-101 *et seq.*).

However, the Helicopter Defendants are not named in Plaintiffs' *Complaint*. (R. *at 10*).[1]

The first cause of action in Plaintiffs' *Complaint* seeks a declaratory judgment stating that the Helicopter Defendants are not covered by the *Volunteer Government Worker's Act* and not immune under the *Immunity for Persons Performing Voluntary Service Act*. (R. *at 6-7*). Plaintiffs' second cause of action is identified as "*Immunity for Persons Performing Voluntary Service Act*" and alleges that the Helicopter Defendants are not volunteers under that statute. The second cause of action then states "[h]owever, in the event that a court of competent jurisdiction determines that [the Helicopter Defendants] are volunteers and that Grayson was merely negligent, Plaintiffs are entitled to recover their damages[.]" (R. *at 5-6*). Plaintiffs' third cause of action is entitled "*Volunteer Government Workers Act*" and states "[i]n the event that a court of competent jurisdiction finds [the Helicopter Defendants] to be volunteers under the *Volunteer Government Workers Act* . . ., Plaintiffs are entitled to recover their damages as set forth below from Uintah County under a statutory policy of defense and indemnity." (R. *at 5*).

At the time Plaintiffs filed this action (*Orr II*) there was already an action pending in the Eighth Judicial District Court filed by Plaintiffs against persons and entities allegedly responsible for Detective Orr's death, including the Helicopter Defendants ("*Orr I*").[2] Uintah County is not named as a Defendant in *Orr I*, but it moved to intervene

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[1] Plaintiffs' *Complaint* is Exhibit F to the *Addendum to Brief of Appellants*.

[2] That Eighth Judicial District case is captioned *Claudia Orr and Eugene Orr et. al. v. Brian Grayson, et. al.* (Case No. 070800045).

in that case and substitute itself for the Helicopter Defendants. (*R. at 220-21*). Uintah County's *Motion to Intervene* averred that the Helicopter Defendants were volunteers at the time of Detective Orr's death, which qualified them as County employees entitled to governmental immunity. (*R. at 217*). Plaintiffs opposed that *Motion*. In addition, Plaintiffs asked for and received from the Court a continuance in order to conduct discovery as to the volunteer status of the Helicopter Defendants. (*R. at 217*). Upon completion of that discovery, Uintah County renewed its *Motion to Intervene*. Meanwhile, Plaintiffs commenced the instant action, *Orr II*, in anticipation of the Court's ruling on the *Motion to Intervene* in *Orr I*. (*R. at 217*).

On April 8, 2009, the Court issued its *Ruling and Order* in *Orr I* and found that the Helicopter Defendants were not volunteers so as to qualify as Uintah County employees. That Court also found that Uintah County was not entitled to intervene and be substituted in the place of the Helicopter Defendants. (*R. at 200-09*). In other words, the Court in *Orr I* has already decided the very issues Plaintiffs attempted to re-litigate in *Orr II*.

In light of this procedural history, Uintah County filed a *Motion to Dismiss* in the instant case, *Orr II*, arguing that Plaintiffs' *Complaint* was an attempt to relitigate the issues of *Orr I*. Uintah County's *Motion to Dismiss* cited several legal doctrines in support of dismissal, including *res judicata*, collateral estoppel, judicial comity, the law

of the case doctrine, and the first filed rule. (*R. at 194-222*).[3] Plaintiffs failed to challenge, or even address, these legal doctrines in their *Opposition to Defendant's Motion to Dismiss*. (*R. at 223-44*).[4] Uintah County pointed this concession out to the District Court in its *Reply Memorandum in Support of Motion to Dismiss*. (*R. at 248-54*).[5]

On April 21, 2010, the District Court granted the *Motion to Dismiss* and issued a *Ruling and Order on Defendant's Motion to Dismiss* ("*Ruling and Order*"). ®. *at 517-520*).[6] In short, the Court granted the *Motion to Dismiss* because Plaintiffs' first and second causes of action should have been brought against the Helicopter Defendants in *Orr I*, and because the Helicopter Defendants are not parties to this case. (*Adden. Exhibit D, R. at 519*). The District Court dismissed Plaintiffs' third cause of action because Plaintiffs failed to allege that Uintah County was negligent. (*Adden. Exhibit D, R. at 519*). The Court further ruled that "the Plaintiffs' reason for initiating this action is to create a fall back in the event that they are unsuccessful in Orr I. If the Plaintiffs wanted

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[3] Uintah County's *Motion to Dismiss and Memorandum in Support* is attached hereto as Exhibit A of the *Appellee's Addendum*.

[4] Plaintiffs' *Memorandum in Opposition to Uintah County's Motion to Dismiss* is attached hereto as Exhibit B of the *Appellee's Addendum*.

[5] Uintah County's *Reply Memorandum in Support of Motion to Dismiss [and] Memorandum in Opposition to Motion to Change Venue* is attached hereto as Exhibit C of the *Appellee's Addendum*.

[6] The District Court's *Ruling and Order* is attached hereto as Exhibit D of the *Appellee's Addendum*.

to bring a claim that arose from the same facts and circumstances as those in Orr I, they should have stated that claim in their case." (*Adden. Exhibit D, R. at 519*). Finally, the Court stated that Plaintiffs' "claim is uncertain and fails to specify the cause of action. The claim is contingent on the outcome of *Orr I*." (*Adden. Exhibit D, R. at 518-19*). Plaintiffs now appeal from the District Court's *Ruling and Order*. ®. *at 523-31*).

RESPONSE TO PLAINTIFFS' SUGGESTION OF PARTIAL MOOTNESS

Plaintiffs' brief contains a section entitled "Suggestion of Partial Mootness," which states that Plaintiffs have settled with Pete Martin Drilling and Brian Grayson. (*App. Br. at 1*). Plaintiffs also state that the District Court's ruling in *Orr I* on Uintah County's *Motion to Intervene* is a final order and that all issues in *Orr I* that relate to Uintah County have been resolved. (*App. Br. at 1-2*). Plaintiffs fail to explain why these events render their appeal partially moot. Nevertheless, Plaintiffs settlement with Pete Martin Drilling and Brian Grayson is irrelevant to this appeal as those parties are not named in this case. Further, the District Court's ruling in *Orr I* does not render this appeal moot. Rather, as discussed below, the District Court's dismissal of Plaintiffs' *Complaint* should be affirmed because that *Complaint* attempted to relitigate the issues previously decided in *Orr I*.

SUMMARY OF THE ARGUMENT

This Court should affirm the District Court's 12(b)(6) dismissal on the merits because even when the allegation in Plaintiffs' *Complaint* are construed in Plaintiffs'

favor, those allegations fail to state a claim upon which relief could be granted. Any claims that Plaintiffs had against the Helicopter Defendants should have been raised in *Orr I* and not in this matter. The District Court also properly dismissed Plaintiffs' third cause of action because Plaintiffs have not alleged any negligence on the part of Uintah County. Further, Plaintiffs' declaratory judgment claims seek relief that will affect the interests of the Helicopter Defendants, yet those parties are not named in this case.

Additionally, this Court should affirm the District Court's *Ruling and Order* because Plaintiffs have inadequately briefed their appeal. Plaintiffs' brief is conclusory at best and contains no explanation or analysis of their position. Plaintiffs also failed to cite to the record, failed to provide a transcript of the hearing on Uintah County's *Motion to Dismiss*, and have not included the District Court's *Ruling and Order* in their *Appendix*.

This Court should also affirm the District Court based on any theory or ground that it finds in the record. Uintah County's *Motion to Dismiss* provided several reasons for dismissal of Plaintiffs' *Complaint*, but the District Court focused on rule 12(b)(6) of the Utah Rules of Civil Procedure. This Court has discretion to apply Uintah County's alternative arguments and affirm the dismissal of Plaintiffs' *Complaint*.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' *COMPLAINT* UNDER RULE 12(b)(6) OF THE UTAH RULES OF CIVIL PROCEDURE.

Plaintiffs assert that the District Court's 12(b)(6) dismissal of their case was improper because Plaintiffs' *Complaint* alleged all of the statutory elements in the *Immunity for Persons Performing Voluntary Service Act* (Utah Code section 63G-8-202) against Uintah County, and because those allegations must be deemed to be true for purposes of analyzing a *Motion to Dismiss*. (*App. Br. at 8*).[7] As will be discussed below, the District Court correctly dismissed Plaintiffs' claims because they failed to state a claim upon which relief can be granted.

A. The Motion to Dismiss Standard.

Rule 12(b)(6) of the Utah Rules of Civil Procedure provides a challenge to a plaintiff's relief based on his or her "failure to state a claim upon which relief can be granted." *Utah R. Civ. P.* 12(b)(6). "[T]he purpose of a rule 12(b)(6) motion is to challenge the formal sufficiency of the claim for relief, not to establish the facts or resolve the merits of a case. . . . [And] a dismissal is justified only when the allegations of the complaint clearly demonstrate that the plaintiff does not have a claim." *Whipple v.*

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[7] Plaintiffs' appeal apparently concerns only the District Court's dismissal of Plaintiffs' claims under the *Immunity for Persons Performing Voluntary Service Act* (Utah Code section 63G-8-101 *et seq.*) and not the *Volunteer Government Worker's Act* (Utah Code section 67-20-1 *et seq.*). Plaintiffs' *Notice of Appeal*, however, wholly appeals from the District Court's *Ruling and Order*. (*R. at 523-31*). As will be discussed in this brief, all aspects of the District Court's *Ruling and Order* should be affirmed.

Am. Fork Irrigation Co., 910 P.2d 1218, 1220 (Utah 1996). "In reviewing a motion to dismiss, [Courts] accept the factual allegations in the complaint as true and draw all reasonable inferences from those facts in a light most favorable to plaintiffs." *Hebertson v. Willowcreek Plaza*, 923 P.2d 1389, 1390 (Utah 1996) (internal quotations omitted). When reviewing a rule 12(b)(6) dismissal, this Court must "accept the plaintiff's description of facts alleged in the complaint to be true, but [it] need not accept extrinsic facts not pleaded nor need [it] accept legal conclusions in contradiction of the pleaded facts." *Osguthorpe v. Wolf Mt. Resorts, L.C.*, 2010 UT 29, ¶ 10, 232 P.3d 999 (emphasis added) (internal quotations omitted). Thus, the District Court had to determine whether Plaintiffs' *Complaint* set forth factual allegations sufficient to raise a right to relief above the speculative level. Plaintiffs failed to meet this burden and the District Court's 12(b)(6) dismissal was proper.

B. The District Court Properly Applied Rule 12(b)(6) and this Court Should Affirm the Dismissal of Plaintiffs' Complaint.

(1) The District Court Construed the Allegations in Plaintiffs' Complaint as True.

The District Court's April 21, 2010 *Ruling and Order* correctly interpreted the facts alleged in Plaintiffs' *Complaint* and determined that Plaintiffs did not have a claim against Uintah County. Indeed, the District Court noted that "[t]he *Rule* 12(b)(6) defense is a challenge to the plaintiff's right to relief **based on the facts the plaintiff has alleged in the complaint**." (*Adden. Exhibit D, R. at 519* (emphasis added)). In other words, the

District Court accepted the factual allegations in Plaintiffs' *Complaint* as true and drew all reasonable inferences from those facts in a light most favorable to Plaintiffs. *Hebertson*, 923 P.2d at 1390. Thus, the District Court correctly applied the standard for a motion to dismiss and properly construed Plaintiffs' *Complaint* in its *Ruling and Order*.

(2) The District Court Properly Dismissed Plaintiffs' First and Second Causes of Action.

The District Court dismissed Plaintiffs' first and second causes of action because it determined that those claims should have been brought against the Helicopter Defendants in *Orr I*, and because the Helicopter Defendants were not parties to this case. (*Adden. Exhibit D, R. at 519*). A review of Plaintiffs' *Complaint* demonstrates the correctness of the District Court's dismissal.

The first cause of action in Plaintiffs' *Complaint* seeks a declaratory judgment stating that the Helicopter Defendants are not covered by the *Volunteer Government Worker's Act* and not immune under the *Immunity for Persons Performing Voluntary Service Act*. ®. *at 6-7*). Plaintiffs' second cause of action alleges that the Helicopter Defendants are not volunteers under the *Immunity for Persons Performing Voluntary Service Act* and then states "[h]owever, in the event that a court of competent jurisdiction determines that [the Helicopter Defendants] are volunteers and that Grayson was merely negligent, Plaintiffs are entitled to recover their damages[.]" ®. *at 5-6*).

The District Court construed Plaintiffs' second cause of action as a claim for declaratory relief. The District Court dismissed Plaintiffs' first and second cause of

action stating "[The Helicopter Defendants] are not parties to this matter. Furthermore, [The Helicopter Defendants] are defendants in Orr I, which concerns the same facts as this case. Any claims or defenses against these defendants should have been raised in *Orr I*. Therefore, the Court cannot grant the Plaintiff's [sic] requested relief as to those two claims." (*Adden. Exhibit D, R. at 519*). The District Court had ample authority for such a ruling. Uintah County's *Motion to Dismiss* cited several legal doctrines in support of dismissal, including *res judicata*, collateral estoppel, judicial comity, the law of the case doctrine, and the first filed rule. (*Adden. Exhibit A, R. at 194-222*). Plaintiffs failed to challenge, or even address, these legal doctrines in their *Opposition to Defendant's Motion to Dismiss*, (*Adden. Exhibit B, R. at 223-44*), and Uintah County made this point to the District Court, (*Adden. Exhibit C, R. at 248-54*). This failure alone was sufficient to grant the *Motion to Dismiss* because Plaintiffs conceded Uintah County's arguments. *See U.S. v. Garcia*, 52 F. Supp. 2d 1239, 1253 (D. Kan. 1999) (construing party's failure to address issue as a concession of that issue); *Super Film of America v. UCB Films*, 219 F.R.D. 649, 660 (D. Kan. 2004) (determining that moving party's failure to address non-moving party's argument in reply memorandum was sufficient grounds to rule against moving party); *Hinsdale v. City of Liberal, Kansas*, 19 Fed. Appx. 749, 768, 2001 WL 980781 (10th Cir. 2001).

Moreover, the District Court's dismissal of Plaintiffs' first and second cause of action because the Helicopter Defendants were not parties to this case is supported by the

provisions of the Utah declaratory judgment statute, which states "[w]hen declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and a declaration may not prejudice the rights of persons not parties to the proceeding." *Utah Code* § 78B-6-403. Here, the Helicopter Defendants were not joined as parties to this case, despite the fact that their interests would be affected by any declaratory judgment on their status under the *Volunteer Government Worker's Act* and the *Immunity for Persons Performing Voluntary Service Act*. The District Court therefore properly dismissed Plaintiffs' first and second causes of action and this Court should affirm that dismissal.

(3) The District Court Properly Dismissed Plaintiffs' Third Cause of Action.

Plaintiffs' third cause of action states "[i]n the event that a court of competent jurisdiction finds [the Helicopter Defendants] to be volunteers under the *Volunteer Government Workers Act* . . ., Plaintiffs are entitled to recover their damages as set forth below from Uintah County under a statutory policy of defense and indemnity." ®. *at 5*). The District Court dismissed Plaintiffs' third cause of action because Plaintiffs failed to allege that Uintah County was negligent. (*Adden. Exhibit D, R. at 519*). This dismissal was proper because Plaintiffs' *Complaint* does not allege any facts that support their negligence claim against Uintah County. When reviewing a rule 12(b)(6) dismissal, this Court must "accept the plaintiff's description of facts alleged in the complaint to be true, **but [it] need not accept extrinsic facts not pleaded nor need [it] accept legal**

conclusions in contradiction of the pleaded facts." *Osguthorpe v. Wolf Mt. Resorts, L.C.*, 2010 UT 29, ¶ 10, 232 P.3d 999 (emphasis added) (internal quotations omitted). When read as a whole, Plaintiffs' *Complaint* alleges that Uintah County was not negligent because the Helicopter Defendants were not protected by the *Volunteer Government Workers Act*. Plaintiffs then allege that if the *Volunteer Government Workers Act* does apply, Uintah County should be liable. Plaintiffs' *Complaint* does not allege how Uintah County acted negligently so the District Court properly dismissed Plaintiffs' third cause of action and excluded the "extrinsic facts not pleaded" against Uintah County. *Id.*

(4) The District Court Correctly Recognized *Orr II* as an Attempt to Relitigate *Orr I*.

Plaintiffs' *Complaint* in *Orr II* was filed against Uintah County as an end run around the proceedings in *Orr I*. The District Court recognized this strategy and ruled that "the Plaintiffs' reason for initiating this action is to create a fall back in the event that they are unsuccessful in Orr I. If the Plaintiffs wanted to bring a claim that arose from the same facts and circumstances as those in Orr I, they should have stated that claim in their case." (*Adden. Exhibit D, R. at 519*). Finally, the Court stated that Plaintiffs' "claim is uncertain and fails to specify the cause of action. The claim is contingent on the outcome of Orr I." (*Adden. Exhibit D, R. at 518-19*). This ruling should be upheld as demonstrated by the procedural history of *Orr I* and *Orr II*, as well as the legal doctrines cited in Uintah County's *Motion to Dismiss*, including including *res judicata*, collateral estoppel, judicial comity, the law of the case doctrine, and the first filed rule. (*Adden.*

Exhibit D, R. at 194-222).

©) Plaintiffs have Inadequately Briefed their Challenge of the District Court's *Ruling and Order.*

Although Plaintiffs baldly claim that their *Complaint* sufficiently alleged claims to survive Uintah County's *Motion to Dismiss*, Plaintiffs fail to analyze and explain how or why the District Court erred. Specifically, Plaintiffs have not explained their allegation that the District Court failed to construe the facts alleged in Plaintiffs' *Complaint* as true. Similarly, Plaintiffs have not identified (or cited in the record) the specific allegations in their *Complaint* that demonstrate that the District Court erred by granting Uintah County's *Motion to Dismiss*.

In total, Plaintiffs submitted three (3) pages or argument in support of their appeal. (*App. Br. at 7-9*). This conclusory approach contains little to no explanation or analysis of the proceedings below or the legal standards applicable to this appeal. Such a tersely briefed argument constitutes inadequate briefing because "a brief is inadequate if it merely contains bald citations to authority [without] development of that authority and reasoned analysis based on that authority." *Allen v. Friel*, 2008 UT 56, ¶ 9, 194 P.3d 903 (internal quotations omitted). In short, Plaintiffs' brief does not contain sufficient analysis, including citation to case law and the record, to demonstrate that the District Court should be reversed.

Additionally, Plaintiffs' opening brief also fails to cite to the record and does not contain the District Court's *Ruling and Order*, the decision from which their appeal is

taken. This also constitutes inadequate briefing because "not only must [Plaintiffs] point out the perceived errors of the lower court, [they] must also provide the appellate court with the parts of the record that are central to the determination of [their] appeal." *Allen*, 2008 UT 56, ¶ 10; *see also* Utah R. App. P. 24(a)(11)©) (noting that an addendum to the appellant's brief shall contain "those parts of the record on appeal that are of central importance to the determination of the appeal, such as the . . . memorandum decision"). Further, "[i]f a party fails to provide a statement of the facts along with a citation to the record where those facts are supported, we will assume the correctness of the judgment." *Steele v. Board of Review of Indus. Comm'n*, 845 P.2d 960, 962 (Utah Ct. App. 1993).

Plaintiffs also failed to request a transcript of the hearing on Uintah County's *Motion to Dismiss* as required by rule 11 of the Utah Rules of Appellate Procedure. This is problematic because the District Court's *Ruling and Order* expressly referenced arguments made during the hearing. ®. *at 520*). "If an appellant fails to provide an adequate record on appeal, this Court must assume the regularity of the proceedings below." *State v. Robbins*, 709 P.2d 771, 773 (Utah 1985); *see also State v. Wullfenstein*, 657 P.2d 289, 293 (Utah 1982). Furthermore, Plaintiffs do not marshal or explain the District Court's *Ruling and Order*, instead leaving Uintah County to provide the proper context of that ruling. Consequently, this Court should affirm the District Court based on Plaintiffs' inadequate briefing on appeal.

II. THIS COURT SHOULD AFFIRM THE DISTRICT COURT ON ANY GROUND APPARENT IN THE RECORD.

In addition to the foregoing arguments on the merits, this Court should affirm the District Court's dismissal based on the appellate record. "[A]n appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the [district] court to be the basis of its ruling [and] even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court." *State v. Robinson*, 2006 UT 65, ¶ 19, 147 P.3d 448 (second and third alterations in original). Uintah County's *Motion to Dismiss* cited several legal doctrines in support of dismissal, including *res judicata*, collateral estoppel, judicial comity, the law of the case doctrine, and the first filed rule. (*Adden. Exhibit A, R. at 194-222*). Although the District Court did not expressly apply any of these legal theories in its *Ruling and Order*, all of these theories warrant dismissal of Plaintiffs' *Complaint*. This Court has the discretion to apply the doctrines of *res judicata*, collateral estoppel, judicial comity, law of the case, and the first filed rule to affirm the District Court.

CONCLUSION

Based on the foregoing, Uintah County respectfully requests that this Court affirm the District Court's April 21, 2010 *Ruling and Order on Defendant's Motion to Dismiss*, which granted the County's *Motion to Dismiss*.

DATED this 14 day of January, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing *Brief of Appellee Uintah County* and a disc containing a courtesy copy of the same in a searchable PDF format, to be served upon the following via U.S. mail, postage prepaid, this 14 day of January, 2011.

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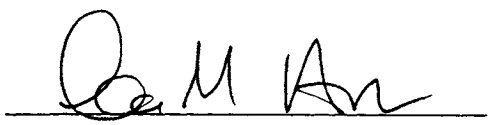

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IN THE UTAH COURT OF APPEALS

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ADDENDUM TO BRIEF OF APPELLEE UINTAH COUNTY, UTAH

On appeal from an order and final judgment of the Eighth Judicial District Court in and for Uintah County, the honorable A. Lynn Payne, District Court Judge

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EIGHTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY

STATE OF UTAH

CLAUDIA ORR and EUGENE ORR, individually, on behalf of their deceased son, KEVIN ORR, HOLLY ORR, individually and on behalf of the estate and heirs of KEVIN ORR, Plaintiffs, vs. UINTAH COUNTY, STATE OF UTAH Defendant.	**UINTAH COUNTY'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT** Civil No. 090800834 Judge A. Lynn Payne **ORAL ARGUMENT IS REQUESTED**

This case arises out of the death of Detective Kevin Orr of the Uintah County Sheriff's Office. Detective Orr was killed in a helicopter crash while on a search and rescue mission. The helicopter was owned by Pete Martin Drilling, Inc., and or Rat Air, Inc. The pilot, a Pete Martin Drilling, Inc. employee, was Brian Grayson.

This is essentially a declaratory judgment action in which Plaintiffs are asking the Court to determine whether Pete Martin Drilling, Inc., Rat Air, Inc. and/or Grayson were "volunteers" so as to be entitled to the immunity provided volunteers under the *Utah Volunteer Services Act, Utah Code Ann.* §§ 63G-8-101, *et seq.* or the *Volunteer Government Worker's Act, Utah Code Ann.* §§ 67-20-1, *et seq*? Plaintiffs are also asking that in the event the Court determines that Pete Martin Drilling, Inc., Rat Air, Inc. and/or Grayson are volunteers so as to be Uintah County employees, then to award Plaintiffs damages from Uintah County.

What Plaintiffs neglect to advise this Court, however, is that there is presently pending in the Uintah County District Court a lawsuit filed by Plaintiffs against persons and entities allegedly responsible for Detective Orr's death, including Pete Martin Drilling, Inc., Rat Air, Inc. and Grayson ("*Orr I*"). But Uintah County, Utah is not named

as a Defendant in *Orr I*.[1] In *Orr I*, however, asserting the volunteer status of Pete Martin Drealing,Inc., Rat Air, Inc. and Grayson Uintah County moved to intervene and to substitute itself as the Defendant in place of Pete Martin Drilling, Inc., Rat Air, Inc. and Grayson. In addition, in *Orr I* these same defendants raised their volunteer status as a defense under both the *Utah Volunteer Services Act, Utah Code Ann.* §§ 63G-8-101, *et seq.* and the *Volunteer Government Worker's Act, Utah Code Ann.* §§ 67-20-1, *et seq.*

On April 8, 2009, the Honorable John R. Anderson issued his *Ruling and Order* on Uintah County's *Motion* to intervene and substitute. In that *Ruling and Order*, Judge Anderson concluded that Pete Martin Drilling, Inc., Rat Air, Inc. and Brian Grayson were not volunteers under either the *Utah Volunteer Services Act* or *Volunteer Government Worker's Act* so as to be entitled to the immunity normally enjoyed by County employees and Uintah County could not be substitute as a proper party Defendant. Judge Anderson also concluded that Pete Martin Drilling, Inc., Rat Air, Inc. and Grayson were not common law servants so as to be otherwise entitled to immunity enjoyed by County employees.[2]

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[1] That Eighth Judicial District case is captioned *Claudia Orr and Eugene Orr et. al. v. Brian Grayson, et. al.*, and it is Case No. 070800045.

[2]A copy of Judge Anderson's *Ruling and Order* is attached hereto as Exhibit A. That decision was entered after extensive discovery by Plaintiffs as to the volunteer status of

Plaintiffs commenced the instant action in the Third Judicial District Court in and for Salt Lake County, Utah on November 4, 2008 ("*Orr II*"). The Third Judicial District court transferred this action to the Uintah County District Court. With this latest lawsuit, Plaintiffs are asking the Court to revisit Judge Anderson's decision.

WHEREFORE, Uintah County, Utah hereby moves to dismiss Plaintiffs' *Complaint*. The relief which Uintah County seeks with this *Motion* this Court is authorized to grant pursuant to *Utah Rules of Civil Procedure* 12(b)(1), 12(b)(6),12(c), as well as the doctrines of *res judicata, collateral estoppel, comity* and the *First Filed Rule*. Uintah County's *Memorandum* in support is set forth below. **Oral argument is requested.**

FACTS

The facts necessary for the Court to rule upon this *Motion* are as follows:

1. Detective Orr was killed on November 21, 2006, during a search and rescue operation being conducted by the Uintah County Sheriff's Office. Detective Orr's death occurred in Uintah County, Utah.

Pete Martin Drilling, Inc., Rat Air, Inc. and Grayson and after a full and fair hearing. The Court can and should take judicial notice of these matters in the related case before Judge Anderson. *See Schweitzer v. Scotts*, 469 F.Supp. 1017, 1020 (C.D. Cal. 1979)(a Court can take judicial notice of its own files in related cases).

2. At the time of his death, Detective Orr was a passenger in a helicopter owned by Pete Martin Drilling, Inc. and operated by Pete Martin's employee Brian Grayson. That helicopter had on it the logo of Rat Air, Inc. and was in the process of being transferred to Rat Air when the accident that took Detective Orr's life occurred.

3. Pilot Grayson was flying the helicopter and Detective Orr was directing the search for missing persons from the air when the helicopter collided with overhead power lines and crashed. At the time of this accident, Pete Martin Drilling, Inc., Grayson and Rat Air, Inc. were assisting the Uintah County Sheriff's Office in that search without compensation.

4. In *Orr I*, Plaintiffs sued Pete Martin Drilling, Inc., Grayson and Rat Air, Inc. for their actions involving Detective Orr's death. These Defendants raised their volunteer status as a defense under both the *Utah Volunteer Services Act, Utah Code Ann.* §§ 63G-8-101, *et seq.* and the *Volunteer Government Worker's Act, Utah Code Ann.* §§ 67-20-1, *et seq.*

5. On October 29, 2008, Uintah County filed in *Orr I* a *Motion* in *Orr I* asking to be allowed to intervene and to substitute itself in the place instead of Pete Martin Drilling, Inc., Brian Grayson and Rat Air, Inc. The very issues Plaintiffs are now raising in *Orr II*.

6. Intervention was sought based upon the County's determination that these Defendants were volunteers at the time of Detective Orr's death so as to qualify as County employees and, therefore, entitled to immunity. Hence, in *Orr I* Utah County asked to be substituted as a proper party Defendant in the place and instead of Pete Martin Drilling, Inc., Rat Air, Inc. and Grayson.

7. Plaintiffs opposed that *Motion*. In addition, Plaintiffs' asked for and received from the District Court a continuance in order to conduct discovery as to the volunteer status of these Defendants. A copy of the Court's *Ruling* allowing for this discovery is attached hereto as Exhibit B.

8. Plaintiffs conducted that discovery, including deposing the Uintah County Commission, present and former Uintah County Sheriffs, present and former Chief Deputy Sheriffs and the County personnel director. Plaintiffs also undertook extensive document discovery on this issue.

9. Upon completion of that discovery, Uintah County renewed its *Motion* to intervene and substitute. Meanwhile, Plaintiffs commenced the instant action, *Orr II*, in the Third Judicial District Court in and for Salt Lake County, Utah on November 4, 2008. Plaintiffs obviously did so in anticipation of Judge Anderson's *Ruling* in *Orr I*.

10. It is also important to note that in *Orr II*, although Plaintiffs are seeking to litigate substantive issues with respect to Pete Martin Drilling, Inc., Rat Air, Inc. and Brian Grayson, these entities and individual are not named as party Defendants.

11. Thereafter, on April 8, 2009, Judge Anderson issued his *Ruling and Order* in *Orr I* finding that Pete Martin Drilling, Inc., Rat Air, Inc. and Grayson were not volunteers so as to be Uintah County employees. Judge Anderson also found that Uintah County, therefore, was not entitled to intervene and be substituted in the place and instead of these Defendants. Again, the very issues Plaintiffs are attempting to re-litigate in *Orr II*.

12. It is not surprising, therefore, that this matter was transferred from the Third Judicial District Court to the Eighth Judicial District Court in and for Uintah County. That transfer having occurred, the issue is now what effect Judge Anderson's *Ruling* has upon this action. Uintah County respectfully submits that Judge Anderson's *Ruling* requires that *Orr II* be dismissed with prejudice.

ARGUMENT

Plaintiffs had a full and fair hearing on the issue of Pete Martin Drilling, Inc., Rat Air, Inc. and Grayson's status as volunteers and whether Uintah County should be substituted in the place and instead as a Defendant. The Plainitffs are entitled to one but

not more than one fair hearing on these issues, which they have received. Consequently, the doctrines of *res judicata* or *collateral estoppel* preclude Plaintiffs from commencing a new action, *Orr I*, in hopes of obtaining a different result. This is true even when the prior action, *Orr I*, is still pending. *See City of Des Moines v. $81,231*, 943 P.2d 669, 675-76 (Wash. App. 1997)(Dismissing second filed lawsuit even though prior action between parties was on appeal and had not yet resulted in a final judgment). Thus, under the doctrines of *res judicata* or *collateral estoppel* Plaintiffs' *Complaint* in *Orr II* must be dismissed. Yet, the *res judicata* and *collateral estoppel* effect of Judge Anderson's ruling in *Orr I* is not the only reason *Orr II* should be dismissed with prejudice.

Another hurdle Plaintiffs must overcome in attempting to re-litigate the issue of volunteer status and Uintah County's liability in the event Pete Martin, Inc., Rat Air, Inc. or Grayson are considered, as a matter of law, to be County employees as a result of their volunteer status. The *law of the case* doctrine raises another such hurdle. The *law of the case* doctrine is a restriction self-imposed by Courts in the interest of judicial efficiency. *Messinger v. Anderson*, 225 U.S. 436, 444 (1912). It is a rule based on sound public policy that litigation should come to an end. *Todd Shipyards v. Auto Transport, S.A.*, 763 F.2d 745 (5th Cir. 1985). Simply put, it is designed to bring about a quick resolution of

disputes by preventing continued argument of issues already decided. *Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1981).

Usually the *law of the case* doctrine requires the District Court to adhere to its prior rulings, adhere to the rulings of an appellate court, or to adhere to another judge's rulings in the same case. But it also applies, as in the instant case, to a Court's prior ruling in a closely related case. *See Lyden By and Through Lyden v. Weiner*, 913 P.2d 451, 454 (Wyo. 1996). In the present case, the *law of the case* doctrine applies because the same issues were decided by Judge Anderson when he denied Uintah County's *Motion to Intervene and Substitute*. *See Gage v. Gen'l Motors Corp.*, 796 F.2d 345, 349-50 (10th Cir. 1986)(applying the *law of the case* doctrine with respect to a state Court's factual/issue determination to a subsequent federal court proceeding involving the same parties). Plaintiffs' attempt in *Orr II* at an end run around Judge Anderson's *Ruling* also triggers the doctrine of *comity* which is, under the circumstances of this case, a variation of the *law of the case* doctrine.

The Utah Supreme Court has repeatedly cautioned "that one District Court judge cannot overrule another District Court judge of equal authority." According to the Utah Supreme Court, this a branch of what is generally terms "*the law of the case*" doctrine which has evolved to avoid the delays and difficulties that arise when one judge is

presented with an issue identical to one which has already been passed upon by a coordinate judge in the same case. Plaintiffs will, of course, argue that this is not the same case. But it is the identical issue between the identical parties before Judge Anderson and therefore the same case. More importantly, the Hawaii Supreme Court had the following poignant observations regarding what Plaintiffs are attempting to do in this second filed suit:

> The normal hesitancy that a Court would have in modifying its own prior rulings is even greater when a judge is asked to vacate the order of a brother or sister judge. The general rule which requires adherence to a prior interlocutory order of another judge of the same court thus commands even greater respect than the doctrine of 'law of the case' which refers to the usual practice of courts to refuse to disturb all prior rulings in a particular case, including rulings made by the judge himself. (citations omitted) Unless *cogent* reasons support the second court's action, any modification of a prior ruling of another court of equal and concurrent jurisdiction will be deemed an abuse of discretion. (Citations omitted)

Long v. City & Cnty. of Honolulu, 665 P.2d 157, 162 (Hawaii 1983) (emphasis in original).

Finally, Plaintiffs' attempt at an end run is likewise precluded by the *First Filed Rule*, which provides that when two lawsuits have been filed involving the same subject matter and/or issue, the Court in which the second filed suit is pending lacks subject matter jurisdiction to decide the matter. A point the Utah Supreme Court made clear in *Nielson v. Scchiller*, 66 P.2d 365 (Utah 1937)when it stated that: "**Where two actions**

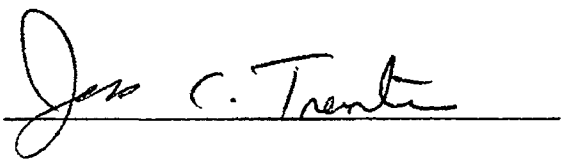
between the same parties . . . to test the same rights are brought in courts having concurrent jurisdiciton, the court which first acquires jurisdiction . . . retains its jurisdiction . . . and no court of coordinate power is at liberty to interfere with its [the first court's] actions". *Id.* at 66 P.2d 368(emphasis added). *See also, Mutual of Enumclaw v. Washington State Human Rights Comm.*, 692 P.2d 882, 884 (Wash. App. 1984)(when the jurisdiction of two tribunals is invoked concerning the same subject or controversy, the tribunal first obtaining jurisdiction has the power to decide the controversy to the exclusion of the other).

CONCLUSION

For the reasons above stated, Plaintiffs' *Complaint* in *Orr II* should be dismissed with prejudice. Simply put, the issue of Peter Martin Drilling, Inc., Rat Air, Inc. and Bryan Grayson's status as County employees and Uintah County's potential liability to Plaintiffs should these Defendants be found to be volunteer/employees was resolved in *Orr I*. Consequently, allowing Plaintiffs to re-try these matters in *Orr II* would not only be a needless waste of judicial resources, but it would also run the risk of inconsistent rulings, which the doctrines of *res judicata, collateral estoppel, comity,* and the *First Filed Rule* are intended to prevent.

DATED this 3rd day of January , 2010.

SUITTER AXLAND, PLLC



Jesse C. Trentadue

UINTAH COUNTY ATTORNEY'S OFFICE
John H. Gothard, Jr.
Deputy Uintah County Attorney
Attorneys for Uintah County, Utah

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 2010 a true and correct copy of the foregoing **UINTAH COUNTY'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT** was served by the method indicated below, to the following:

Joseph W. Steele SIEGFRIED & JENSEN 5664 South Green Street Salt Lake City, UT 84123	( ) ( ) ( ) ( )	(x) U. S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Brad Parker 5664 South Green Street Salt Lake City, Utah 84123	( ) ( ) ( ) ( )	(x) U. S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Tim Dalton Dunn Gerry B. Holman DUNN & DUNN 505 East 200 South, 2nd Floor Salt Lake City, UT 84102	( ) ( ) ( ) ( )	(x) U. S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Loni F. DeLand ATHAY & DELAND 43 East 400 South Salt Lake City, UT 84111	( ) ( ) ( ) ( )	(x) U. S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Richard A. Van Wagoner Robert H. Harrison SNOW, CHRISTENSEN & MARTINEAU 10 Exchange Place, Suite 1100 P.O. Box 45000 Salt Lake City, UT 84145	( ) ( ) ( ) ( )	(x) U. S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
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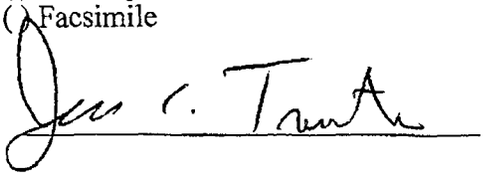

EXHIBIT A

IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR UINTAH COUNTY, STATE OF UTAH

Claudia Orr and Eugene Orr, individually, on behalf of their deceased son, Kevin Orr, Holly Orr, individually and on behalf of the estate and heirs of Kevin Orr, Plaintiffs, **vs.** Brian Grayson, Pete Martin Drilling, Inc., Rat Air, Inc., and Moon Lake Electric Association, Inc., Defendants.	RULING AND ORDER ON UINTAH COUNTY, UTAH'S COMBINED MOTION AND MEMORANDUM RE: INTERVENTION AND SUBSTITUTION OF PARTIES Case No. 070800045 Judge JOHN R. ANDERSON

This matter is before the Court on Uintah County's Motion to Intervene. Brian Grayson, Pete Martin Drilling, Inc., and Rat Air, Inc., join in support of the Motion. Plaintiffs oppose the Motion.

Background Facts

On November 25, 2006, the Uintah County Sheriff's Office was searching for a missing woman. On that date, the Uintah County Deputy Sheriff Robert E. Vandebusse asked Pete Martin Drilling, Inc., to use its helicopter and pilot to assist in the search for the missing woman. Deputy Sheriff Vandebusse made the request to Lori Martin, the secretary and treasurer of Pete Martin Drilling. Lori Martin told Deputy Sheriff Vandebusse that the Sheriff's Office could use the helicopter. There was no offer to pay for the helicopter services, nor was there any request

for payment. Lori Martin then contacted Brian Grayson, the helicopter pilot for Pete Martin Drilling, and told him to go the airport to pilot the helicopter in search of the missing woman.

Detective Kevin Orr, from the Uintah County Sheriff's Office, volunteered to go up in the helicopter to search for the missing woman. The helicopter search area was just south of the Jensen Bridge over the Green River. As Mr. Grayson and Detective Orr were orbiting the search area, the helicopter struck power lines and crashed. Detective Orr died as a result of the crash.

On January 26, 2007, the heirs of Detective Orr filed a complaint against the Defendants. On February 15, 2007, the Plaintiffs filed an amended complaint. Brian Grayson, Pete Martin Drilling, and Rat Air (collectively called the Helicopter Defendants) raised the Utah Volunteer Government Workers Act and the Governmental Immunity Act in their answer. Thereafter, the Uintah County Commissioners approved the Helicopter Defendants' status as volunteers under the Volunteer Government Workers Act in August, 2007. Joe McKea , the Human Resources Director for Uintah County, ratified the County Commissioners' approval of the Helicopter Defendants' status as volunteers on December 7, 2007.

Analysis

Uintah County's Motion to Intervene is based on their claim that the Helicopter Defendants were volunteer government employees under the Volunteer Government Workers Act ("Workers Act"), Utah Code Ann § 67-20-1 et seq. Under the Workers Act, a volunteer government worker is considered a government employee. A volunteer government worker is protected by governmental immunity. Therefore, Uintah County claims that the Plaintiffs' exclusive remedy under the Governmental Immunity Act is to sue the governmental entity. Consequently, Uintah County argues they have a right to intervene under Rule 24(a) of the Utah

Rules of Civil Procedure.

The Plaintiffs oppose the Motion arguing that the Helicopter Defendants were not volunteer government workers, and the Workers Act does not apply. The Plaintiffs argue that because the Workers Act does not apply the Helicopter Defendants are not shielded by governmental immunity, and Uintah County has no right to intervene. Furthermore, the Plaintiffs argue that Mr. Grayson does not qualify as a volunteer under the Workers Act because he was compensated by Pete Martin Drilling. Also, the Plaintiffs argue that Pete Martin Drilling and Rat Air cannot qualify as volunteers under the Workers Act because the Act requires volunteers to be natural, living human beings.

The Court has thoroughly reviewed all the pleadings. For purposes of deciding this Motion, three issues will be examined. First, whether Pete Martin Drilling and Rat Air, as corporations, can be volunteers under the Workers Act. Second, whether Mr. Grayson can be a volunteer under the Workers Act even though he received compensation from his employer. Third, whether the Helicopter Defendants were volunteer government workers under the Workers Act.

I. Whether Pete Martin Drilling and Rat Air, as corporations, can be volunteers under the Volunteer Government Workers Act.

Utah Code Ann. § 67-20-2(3)(a) defines "volunteer" as "any ***person*** who donates services without pay or other compensation except expenses actually and reasonably incurred as approved by the supervising agency." The term "person" is not defined in the Workers Act. The Plaintiffs argue that a volunteer must be a natural, living human being to be considered a volunteer. The Plaintiffs argue that Pete Martin Drilling and Rat Air are corporations, not persons, and therefore

do not qualify as volunteers under the Workers Act. Furthermore, the Plaintiffs argue that the examples of volunteers given throughout the Workers Act are all natural human beings.

First, while this chapter of the Utah Code does not define the term "person", other chapters do. The definition of "person" in the Utah Code often includes businesses and corporations. For example, Utah Code Ann. § 36-11-102(12), Lobbyist Disclosure and Regulation Act, defines "person" as "individuals, bodies politic and corporate, partnerships, associations, and companies." Utah Code Ann. § 57-8-3(22), Condominium Ownership Act, defines "person" as "an individual, corporation, partnership, association, trustee, or other legal entity." In comparison, the term "individual" is also defined in multiple chapters of the Utah Code. In Utah Code Ann. § 26-33a-102(11), "individual" is defined as "a natural person." Based on the many instances of the word "person" being defined in the Utah Code, it is clear to this Court that person includes both natural human beings and organizations like corporations and businesses. The Court is also convinced that the legislature uses the term "individual" when referring to a natural human being.

Clearly, whether a person includes corporations or businesses depends on the context and type of statute involved. However, there is no reason to believe that the use of the term person in the Workers Act excludes businesses or corporations. Corporations and businesses volunteer all of the time. Many corporations volunteer their workforce to provide volunteer services in a variety of circumstances. Also, there may be instances where a government agency is in need of a specialized or expensive piece of equipment. Typically, corporations often own that type of equipment, not individuals. Here, Pete Martin Drilling owned the helicopter that the Uintah County Sheriff's Office needed to search for a missing woman. Without a corporations ability to

be considered a volunteer, a corporation may be reluctant to provide equipment and equipment operators to a government in need.

The Court finds that corporations are considered persons for purposes of the Workers Act.

II. Whether Mr. Grayson can be considered a volunteer under the Volunteer Government Workers Act when he was compensated by his employer.

Again, Utah Code Ann. § 67-20-2 defines "volunteer" as "any person who donates service ***without pay or other compensation*** except expenses actually and reasonably incurred as approved by the supervising agency." The Plaintiffs argue that Mr. Grayson was not a volunteer because he was paid his salary as a helicopter pilot by Pete Martin Drilling.

Clearly, the relationship the Workers Act focuses on is the relationship between the volunteer and the agency accepting the volunteer services. The person providing the services is a volunteer so long as the agency accepting the volunteer services does not compensate for the services. In other words, whether a person is a volunteer is determined from the perspective of the agency receiving the services. It is of no consequence to the agency receiving the services whether a person volunteering is being paid by someone else. The person is a volunteer, as far as the agency is concerned, if the agency does not pay them.

Here, there is no evidence Mr. Grayson was compensated by Uintah County for his helicopter services. Therefore, the Court finds that Mr. Grayson could be a volunteer under the Workers Act even though he was paid by his employer Pete Martin Drilling.

III. Whether the Helicopter Defendants qualify as volunteer government workers under the Workers Act.

The final issue is whether the Helicopter Defendants were volunteer government workers under the Workers Act. Specifically, the issue is whether the Workers Act requires volunteer services to be pre-approved.

Utah Code Ann. § 67-20-4 states:

> A volunteer may not donate any service to an agency unless the volunteer's services are approved by the chief executive of that agency or his authorized representative, and by the office of personnel having jurisdiction over that agency.

Here, approval of the Helicopter Defendants' service by the Uintah County Commissioners came after the Helicopter Defendants provided the service. The Plaintiffs argue that the Workers Act requires volunteer services be approved before the service is rendered. Uintah County and the Helicopter Defendants argue that the statute does not require pre-approval, but simply requires approval of the volunteer services.

The plain language of the statute requires that the volunteer services be pre-approved. While the statute does not explicitly use the words "prior approval" or "pre-approval", the statute does indicate that a person may not volunteer unless the services are approved. That is another way of saying a volunteer services must be pre-approved. If a person cannot volunteer unless approved, logic dictates that the statute requires volunteer services be pre-approved. There would be no reason for the legislature to use language stating a "volunteer may not donate" unless prior approval was required.

Also, Uintah County argues that the Workers Act is a remedial statute designed to encourage people to volunteer. Uintah County argues that construing this remedial statute

liberally requires the Court to find that pre approval is not required. However, after the fact approval would not encourage people to volunteer. After the fact approval would likely discourage people to volunteer. The Workers Act provides a volunteer such things as workers' compensation coverage, governmental immunity from suit and volunteer experience credit. No volunteer would be encouraged to render their services if those benefits were not established for them before hand. In other words, if the benefits the Workers Act provides are the carrot that entice people to volunteer, that carrot needs to be offered before the volunteer provides the services, not after. If a volunteer is encouraged to be a volunteer government worker because of the benefit of being provided with immunity, worker's compensation, and volunteer experience credit, that benefit would need to be ensured to the volunteer before the service is rendered.

Furthermore, the parties have not given, nor is the Court aware of, any explanation of what purpose approval of a volunteer's services after the fact would serve. There is no reason this Court can imagine for the legislature to craft a statute requiring approval of volunteer services if approval after the fact was sufficient. After the fact approval leads to a situation where the agency receiving the volunteer services decides whether the volunteer should be shielded by governmental immunity in the event an injury occurs. Approval after the fact would allow the governmental agency, not a judge or a jury, to decide lawsuits after they are filed.

Throughout the pleadings dealing with this Motion, the question was raised of the practicality of getting approval for a volunteer service under emergency circumstances Simply put, that is not a question this Court has to decide. This Court merely has to use the statutes that the legislature has provided and follow them. The Workers Act requires approval of the volunteer's services, in an emergency situation or otherwise, and prohibits a volunteer from

providing those services until they are approved.

Here, the Helicopter Defendants provided their services to the Uintah County Sheriff's Office before those services were approved. The statute clearly prohibits that sequence. The approval of the Helicopter Defendants' services came months after the accident, and months after the suit was filed. The Court finds that the Workers Act requires approval before the services are rendered. Therefore, the Workers Act does not apply in this situation. Consequently, there is no basis for Uintah County to intervene in this matter. Uintah County's Motion to Intervene and the Helicopter Defendants joinder in that Motion, is denied.

Finally, the Helicopter Defendants make the alternative argument that summary judgment should enter in their favor based on the loaned employee doctrine. The Helicopter Defendants argue that Brian Grayson was loaned to Uintah County and their employee. The Helicopter Defendants Motion under this alternative basis is denied for the reasons set forth by Uintah County in their Reply Memo. The loaned employee doctrine has no application to a governmental entity under Utah law. The method for becoming an employee of the government under these types of circumstances is provided for by statute. Therefore, the common law loaned employee doctrine has been preempted by statute.

Furthermore, under Utah law the loaned employee doctrine "provides that if a labor service loans an employee to a special employer for the performance of work, then the employee, with respect to that work, is the employee of the special employer for whom the work or service is performed." *Gherst v Salazar*, 883 P.2d 1352, 1356 (Utah 1994). The loaned employee applies when "the employee has made a contract of hire . . . with the special employer[.]" *Id.*

Here, there is no evidence that any of the involved parties made a contract for hire.

Furthermore, none of the parties could be properly characterized as a labor service. Therefore, the loaned employee doctrine does not apply. The Helicopter Defendants' alternative motion for summary judgment is denied.

Dated this 8 day of April, 2009.

BY THE COURT:

JOHN R. ANDERSON, District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 070800045 by the method and on the date specified.

MAIL: DAVID C BIGGS 5664 S GREEN ST MURRAY, UT 84123
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MAIL: RICHARD A VAN WAGONER 10 EXCHANGE PLACE 11TH FLR POB 45000 SALT LAKE CITY UT 84145
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Date: Apr 14, 2009

Deputy Court Clerk

000260

EXHIBIT B

IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR UINTAH COUNTY, STATE OF UTAH

Claudia Orr and Eugene Orr, individually, on behalf of their deceased son, Kevin Orr, Holly Orr, individually and on behalf of the estate and heirs of Kevin Orr, Plaintiffs, vs. Brian Grayson, Pete Martin Drilling, Inc., Rat Air, Inc., and Moon Lake Electric Association, Inc., Defendants.	RULING AND ORDER Case No. 070800045 Judge JOHN R. ANDERSON

This matter is before the court on the Plaintiff's Motion for a Rule 56(f) Continuance.

Rule 56(f) of the Utah Rules of Civil Procedure states:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

"[R]ule 56(f) motions opposing a summary judgment motion on the ground that discovery has not been completed should be granted liberally unless they are deemed dilatory or lacking in merit." *Salt*

Lake County v. Western Dairymen Coop., 48 P.3d 910, 917 (Utah 2002).

"A rule 56(f) motion has merit when it targets core issues that might defeat the pending summary judgment motion." *Energy Mgmt. Servs., L.L.C. v. Shaw*, 110 P.3d 158, 161 (Utah App. 2005).

"A party's rule 56(f) motion for a continuance is not dilatory if the party has already initiated discovery proceedings, diligently seeks access to information that is within the sole control of the adverse party, and is denied an adequate opportunity to conduct the desired discovery." *Id.* at 161.

Here, the Plaintiff's motion has merit. The Plaintiff seeks to depose certain Uintah County officials concerning the circumstances of the "helicopter" pilots status as volunteers. The information those officials provide might defeat the pending summary judgment motion.

The Plaintiff's motion is not dilatory. The Plaintiff has wanted to depose these individuals but the attorney responsible for this case resigned. The depositions were cancelled but timely rescheduled once another attorney within the firm took over. Therefore, the Plaintiff has already initiated discovery proceedings, and has diligently sought access to the information.

Finally, because the motion has merit and is not dilatory, a continuance should be liberally granted.

The Plaintiff's motion for a rule 56(f) continuance is granted. The oral argument hearing scheduled for January 15, 2008 will be

continued without a date set.

Dated this 31st day of Dec., 2007.

BY THE COURT:

JOHN R. ANDERSON, District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 070800045 by the method and on the date specified.

METHOD	NAME
Mail	ROGER H BULLOCK Attorney DEF 3 TRIAD CENTER STE 500 SALT LAKE CITY, UT 84180
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By Hand	EDWIN T PETERSON

Case No: 070800045
Date: Jan 07, 2008

Dated this 7th day of January, 2008.

Deputy Court Clerk

000104

Tab B

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EIGHTH JUDICIAL DISTRICT COURT
UINTAH COUNTY, STATE OF UTAH

CLAUDIA ORR and EUGENE ORR, individually, on behalf of their deceased son, KEVIN ORR, HOLLY ORR, individually and on behalf of the estate and heirs of KEVIN ORR, Plaintiffs, vs. UINTAH COUNTY, STATE OF UTAH Defendant	**PLAINTIFFS' MOTION TO CHANGE VENUE AND MEMORANDUM IN SUPPORT** **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** Civil No. 090800834 Judge A. Lynn Payne

MOTION

Plaintiffs' hereby submit their Motion for Change of Venue and Memorandum in Support.

Plaintiffs' also submit their Opposition to Uintah County's Motion to Dismiss.

MEMORANDUM

Any case against Uintah County is not properly venued in Uintah County. The *Durham* case is controlling Supreme Court authority. *See Durham v. Duchesne County,* 893 P.2d 581 (Utah 1995). Plaintiffs cannot be forced to litigate their case against the County on its own courthouse steps. *See id.* at 583. Plaintiffs request that this case be venued in any adjacent county, or Salt Lake County because all the law firms involved in the case are located in Salt Lake County. If Defendant prefers, the case against Uintah County can be transferred to another county adjacent to Uintah County by stipulation.

If the Court denies Plaintiffs Motion for Change of Venue in this action, Plaintiffs hereby submit their Opposition to Uintah County's Motion to Dismiss.

ARGUMENT

I. PLAINTIFFS CANNOT HAVE A FAIR TRIAL AGAINST UINTAH COUNTY WHILE VENUED IN UINTAH COUNTY

This action should be transferred away from Uintah County because Plaintiffs cannot be forced to litigate against Uintah County in Uintah County. In *Durham v. Duchesne County,* 893 P.2d 581 (Utah 1995), the Utah Supreme Court acknowledged:

> [a] disadvantage of being required to sue a county for damages in its own courthouse. This disadvantage is magnified in small rural counties where jurors will also be county taxpayers with an incentive to keep their taxes and, consequently, any damage award low. Permitting actions against counties to be tried in adjoining counties guards against the risk of local prejudice and affords litigants a relatively convenient alternative forum in which to bring their actions without the need to demonstrate bias or impartiality.

See id. at 583. Plaintiffs will be severely prejudiced if they have to litigate its case against the

County in Uintah County. The Plaintiffs are entitled to a neutral jury in its case against Uintah County. A large majority of the witnesses at trial will be county personnel and other residents of Vernal. Over two dozen depositions have been taken in this case and more have yet to be taken. Given the sheer number of witnesses and the small size of the town of Vernal, it will be difficult to obtain a jury who does not know one or more of the individuals deposed. Finally, Detective Orr was a prominent citizen who was recognized for his service to the community. Given these factors, it will be nearly impossible to seat a jury in Vernal

Plaintiffs' respectfully request that venue be transferred to a county adjacent to Uintah County or Salt Lake County. Plaintiffs' also request that this action be stayed.

PLAINTIFFS OPPOSITION TO MOTION TO DISMISS

I. PLAINTIFFS STILL HAVE A VIABLE CLAIM AGAINST UINTAH COUNTY

This case should not be dismissed because if the appellate courts reverse, then Plaintiffs will be left without a remedy. This Complaint must be left on file to protect Plaintiffs from statute of limitations problems in the event of Defendant succeeding upon such appeal. There were two questions decided by Jude Anderson. First, were the Pete Martin Defendants volunteers under Utah Code Ann. §67-20-1 *See id.* Second, did the Pete Martin Defendants provide voluntary services under §63G-8-201. Judge Anderson expressly and implicitly decided both questions in the negative. The Pete Martin Defendants petitioned for review which was denied. This action protects Plaintiffs' rights against the County in the event of a reversal of Judge Anderson's rulings.

This case involves a search and rescue mission where Brian Grayson, in the course and

scope of his employment with Pete Martin Drilling ("PMD"), flew into Moon Lake's power lines, killing Detective Orr. All events occurred in Uintah County, where a lawsuit was filed against Grayson, Rat Air, and Pete Martin Drilling (the "helicopter defendants") as well as Moon Lake Electric Association, Inc. ("*Orr I*").

In their answer to *Orr I*, Plaintiffs learned that Grayson and the other corporate defendants were claiming to be volunteers under the *Volunteer Government Workers Act*, *see* Utah Code Ann. §§ 67-20-1 et seq., despite the fact that Grayson was being paid for his work by his employer and despite the lack of approval of his services as provided by statute. The *Volunteer Government Workers Act* considers volunteers as government employees for the purpose of receiving workers' compensation benefits. *See* Utah Code Ann. § 67-20-3 (2008). A volunteer is defined as "any person who donates service without pay or other compensation except expenses actually and reasonably incurred as approved by the supervising agency." *See id.* § 67-20-2. The Act has the effect of making a volunteer a quasi-employee of the government because the volunteer is indemnified in the same way that the government would indemnify any paid government employee. *See id.* § 67-20-3(1)©). At this point the County made a Motion to Intervene, claiming they were responsible for the acts of the helicopter defendants. Because the County claimed such responsibility, Plaintiffs also had to file suit against the County, so that there would be a complaint on file (*Orr II*). After extensive briefing, Judge Anderson ruled that the helicopter defendants were not government workers within the meaning of the *Act,* because the county did not give prior approval but should the helicopter defendants lose on this point at trial they may appeal Judge Anderson's determination and the outcome of such an appeal is, of course, uncertain. See Exhibit 1, Ruling and Order.

Also at issue, and extensively briefed in the County's Motion to Intervene, is the *Immunity for Persons Performing Voluntary Services Act. The Services Act* applies to the helicopter services donated by the helicopter defendants. The *Services Act* provides:

> Any person performing services on a voluntary basis, without compensation, under the general supervision of, and on behalf of any public entity, shall be immune from liability with respect to any decisions or actions, other than in connection with the operation of a motor vehicle, taken during the course of those services, unless it is established that such decisions or actions were grossly negligent, not made in good faith, or were made maliciously.

Utah Code Ann. § 63G-8- 201. Judge Anderson also implicitly found this Act inapplicable, in the event of reversal or further proceeding Plaintiffs would contend that Grayson was grossly negligent in flying the helicopter. However, if it is found that he was not, the County can still be sued for the conduct of its service providers or its workers. After reversal, if the facts in this case are such that the County is found to be responsible for the conduct of the helicopter defendants, and Bryan Grayson is found to be a service provider or a worker, then the County would be liable. It is apparent in Judge Anderson's ruling that there was no basis for the County to intervene and claim responsibility for the helicopter defendants, and thus he denied their motion. See Exhibit 1, Ruling and Order. Therefore, this Complaint is prophylactic.

In order to preserve their claim against the County, Plaintiffs filed *Orr II,* against Uintah County. If the helicopter defendants are found to be service providers or volunteer government workers, by an appellate court, then the County is responsible. Plaintiffs made it clear on the face of the Complaint that it was filed to prevent the running of the statute of limitations against the County in the event of reversal. The problem is, however, that the Defendants now claim that they were providing volunteer services for the County under the *Volunteer Services Act, see* Utah

Code Ann. § 63-30b-1, renotified at 63G-8-101. Plaintiff believes this issue has been waived by the arguments presented to Judge Anderson. See Exhibit 2, Letter from Roger Bullock.

Although it is the law of the case that the helicopter defendants are not voluntary government workers, that ruling is ultimately appealable and such outcome is unpredictable. Additionally, per Pete Martin, the law of the case does not preclude litigating whether the helicopter defendants were performing voluntary services. Thus this issue is yet to be argued and tried. If and when the helicopter defendants lose again before the trial court, they may and will appeal that decision as well as Judge Anderson's decision finding that one cannot be retroactively declared a government worker.

If the finder of fact finds the helicopter defendants to be service providers, or, if the appeals court finds that Judge Anderson erroneously concluded that the helicopter defendants were not government workers, Plaintiffs have a claim against the County. In either of the above two situations, the County has potential liability for the conduct of the helicopter defendants. Plaintiffs are constrained by well understood time limitations to file a complaint within one year after serving a notice of claim against a governmental entity. *See* Utah Code Ann. § 63G-7-401. Plaintiffs served a notice of claim on Uintah County on November 8, 2007. Uintah County did not respond. Plaintiffs then filed a complaint in Third District on November 8, 2008, within one year of filing its notice of claim. *See id.* Plaintiffs were forced do this within the one year statute of limitations or waive their rights under the *Governmental Immunity Act. Id.* If this Complaint is dismissed, the Government Immunity Act may preclude Plaintiff's alternative Complaint against the County.

CONCLUSION

Plaintiffs therefore respectfully ask this Court to change the venue of this action, or in the alternative, deny the County's Motion to Dismiss and hold this matter in abeyance.

Dated this 18th day of January, 2010.

STEELE & BIGGS

JOSEPH W. STEELE
KENNETH D. LOUGEE
Attorney for Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that on this 18th day of January, 2010, I caused to be mailed, United States Mail, postage prepaid, a true and correct copy of the foregoing **PLAINTIFFS' MOTION TO CHANGE VENUE AND MEMORANDUM IN SUPPORT AND PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** to the following:

Tim Dalton Dunn Gerry B. Holman DUNN & DUNN 505 East 200 South, 2nd Floor Salt Lake City, UT 84102 *Attorney for Moon Lake Electric Association, Inc.*	√) U.S. Mail, postage prepaid ( ) Hand delivered ( ) Overnight mail ( ) Facsimile
Loni F. DeLand ATHAY & DELAND 43 East 400 South Salt Lake City, UT 84111 *Attorney for Brian Grayson, Pete Martin Drilling, Inc., and Rat Air, Inc. on Cross-Claim*	√) U.S. Mail, postage prepaid ( ) Hand delivered ( ) Overnight mail ( ) Facsimile
Roger H. Bullock, Esq. STRONG & HANNI 3 Triad Center, Ste 500 Salt Lake City, UT 84180 *Attorney for Brian Grayson, Pete Martin Drilling, Inc., and Rat Air, Inc.*	√) U.S. Mail, postage prepaid ( ) Hand delivered ( ) Overnight mail ( ) Facsimile
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Richard A. Van Wagoner Robert H. Harrison SNOW, CHRISTENSEN & MARTINEAU 10 Exchange Place, Suite 1100 P.O. Box 45000 Salt Lake City, UT 84145 *Attorney for Brian Grayson, Pete Martin Drilling, Inc., and Rat Air, Inc. on Cross-Claim*	√) U.S. Mail, postage prepaid ( ) Hand delivered ( ) Overnight mail ( ) Facsimile

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Edwin T. Peterson Deputy Uintah County Attorney 152 East 100 North Vernal, UT 84078	√) U.S. Mail, postage prepaid ( ) Hand delivered ( ) Overnight mail ( ) Facsimile
Brad H. Parker James W. McConkie PARKER & McCONKIE 5664 South Green Street Salt Lake City, Utah 84123 Attorneys for Plaintiffs Claudia Orr and Eugene Orr	√) U.S. Mail, postage prepaid ( ) Hand delivered ( ) Overnight mail ( ) Facsimile

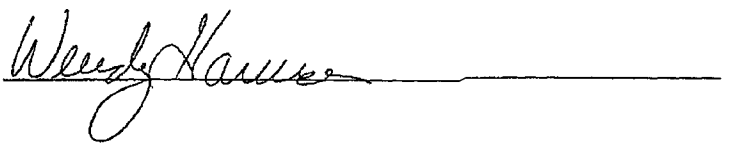

Exhibit 1

IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR UINTAH COUNTY, STATE OF UTAH

Claudia Orr and Eugene Orr, individually, on behalf of their deceased son, Kevin Orr, Holly Orr, individually and on behalf of the estate and heirs of Kevin Orr, Plaintiffs, vs. Brian Grayson, Pete Martin Drilling, Inc., Rat Air, Inc., and Moon Lake Electric Association, Inc., Defendants.	RULING AND ORDER ON UINTAH COUNTY, UTAH'S COMBINED MOTION AND MEMORANDUM RE: INTERVENTION AND SUBSTITUTION OF PARTIES Case No. 070800045 Judge JOHN R. ANDERSON

This matter is before the Court on Uintah County's Motion to Intervene. Brian Grayson, Pete Martin Drilling, Inc., and Rat Air, Inc., join in support of the Motion. Plaintiffs oppose the Motion.

Background Facts

On November 25, 2006, the Uintah County Sheriff's Office was searching for a missing woman. On that date, the Uintah County Deputy Sheriff Robert E. Vandebusse asked Pete Martin Drilling, Inc., to use its helicopter and pilot to assist in the search for the missing woman. Deputy Sheriff Vandebusse made the request to Lori Martin, the secretary and treasurer of Pete Martin Drilling. Lori Martin told Deputy Sheriff Vandebusse that the Sheriff's Office could use the helicopter. There was no offer to pay for the helicopter services, nor was there any request

for payment. Lori Martin then contacted Brian Grayson, the helicopter pilot for Pete Martin Drilling, and told him to go the airport to pilot the helicopter in search of the missing woman.

Detective Kevin Orr, from the Uintah County Sheriff's Office, volunteered to go up in the helicopter to search for the missing woman. The helicopter search area was just south of the Jensen Bridge over the Green River. As Mr. Grayson and Detective Orr were orbiting the search area, the helicopter struck power lines and crashed. Detective Orr died as a result of the crash.

On January 26, 2007, the heirs of Detective Orr filed a complaint against the Defendants. On February 15, 2007, the Plaintiffs filed an amended complaint. Brian Grayson, Pete Martin Drilling, and Rat Air (collectively called the Helicopter Defendants) raised the Utah Volunteer Government Workers Act and the Governmental Immunity Act in their answer. Thereafter, the Uintah County Commissioners approved the Helicopter Defendants' status as volunteers under the Volunteer Government Workers Act in August, 2007. Joe McKea , the Human Resources Director for Uintah County, ratified the County Commissioners' approval of the Helicopter Defendants' status as volunteers on December 7, 2007.

Analysis

Uintah County's Motion to Intervene is based on their claim that the Helicopter Defendants were volunteer government employees under the Volunteer Government Workers Act ("Workers Act"), Utah Code Ann § 67-20-1 et seq. Under the Workers Act, a volunteer government worker is considered a government employee. A volunteer government worker is protected by governmental immunity. Therefore, Uintah County claims that the Plaintiffs' exclusive remedy under the Governmental Immunity Act is to sue the governmental entity. Consequently, Uintah County argues they have a right to intervene under Rule 24(a) of the Utah

Rules of Civil Procedure.

The Plaintiffs oppose the Motion arguing that the Helicopter Defendants were not volunteer government workers, and the Workers Act does not apply. The Plaintiffs argue that because the Workers Act does not apply the Helicopter Defendants are not shielded by governmental immunity, and Uintah County has no right to intervene. Furthermore, the Plaintiffs argue that Mr. Grayson does not qualify as a volunteer under the Workers Act because he was compensated by Pete Martin Drilling. Also, the Plaintiffs argue that Pete Martin Drilling and Rat Air cannot qualify as volunteers under the Workers Act because the Act requires volunteers to be natural, living human beings.

The Court has thoroughly reviewed all the pleadings. For purposes of deciding this Motion, three issues will be examined. First, whether Pete Martin Drilling and Rat Air, as corporations, can be volunteers under the Workers Act. Second, whether Mr. Grayson can be a volunteer under the Workers Act even though he received compensation from his employer. Third, whether the Helicopter Defendants were volunteer government workers under the Workers Act.

I. Whether Pete Martin Drilling and Rat Air, as corporations, can be volunteers under the Volunteer Government Workers Act.

Utah Code Ann. § 67-20-2(3)(a) defines "volunteer" as "any *person* who donates services without pay or other compensation except expenses actually and reasonably incurred as approved by the supervising agency." The term "person" is not defined in the Workers Act. The Plaintiffs argue that a volunteer must be a natural, living human being to be considered a volunteer. The Plaintiffs argue that Pete Martin Drilling and Rat Air are corporations, not persons, and therefore

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do not qualify as volunteers under the Workers Act. Furthermore, the Plaintiffs argue that the examples of volunteers given throughout the Workers Act are all natural human beings.

First, while this chapter of the Utah Code does not define the term "person", other chapters do. The definition of "person" in the Utah Code often includes businesses and corporations. For example, Utah Code Ann. § 36-11-102(12), Lobbyist Disclosure and Regulation Act, defines "person" as "individuals, bodies politic and corporate, partnerships, associations, and companies." Utah Code Ann. § 57-8-3(22), Condominium Ownership Act, defines "person" as "an individual, corporation, partnership, association, trustee, or other legal entity." In comparison, the term "individual" is also defined in multiple chapters of the Utah Code. In Utah Code Ann. § 26-33a-102(11), "individual" is defined as "a natural person." Based on the many instances of the word "person" being defined in the Utah Code, it is clear to this Court that person includes both natural human beings and organizations like corporations and businesses. The Court is also convinced that the legislature uses the term "individual" when referring to a natural human being.

Clearly, whether a person includes corporations or businesses depends on the context and type of statute involved. However, there is no reason to believe that the use of the term person in the Workers Act excludes businesses or corporations. Corporations and businesses volunteer all of the time. Many corporations volunteer their workforce to provide volunteer services in a variety of circumstances. Also, there may be instances where a government agency is in need of a specialized or expensive piece of equipment. Typically, corporations often own that type of equipment, not individuals. Here, Pete Martin Drilling owned the helicopter that the Uintah County Sheriff's Office needed to search for a missing woman. Without a corporations ability to

be considered a volunteer, a corporation may be reluctant to provide equipment and equipment operators to a government in need.

The Court finds that corporations are considered persons for purposes of the Workers Act.

II. Whether Mr. Grayson can be considered a volunteer under the Volunteer Government Workers Act when he was compensated by his employer.

Again, Utah Code Ann. § 67-20-2 defines "volunteer" as "any person who donates service *without pay or other compensation* except expenses actually and reasonably incurred as approved by the supervising agency." The Plaintiffs argue that Mr. Grayson was not a volunteer because he was paid his salary as a helicopter pilot by Pete Martin Drilling.

Clearly, the relationship the Workers Act focuses on is the relationship between the volunteer and the agency accepting the volunteer services. The person providing the services is a volunteer so long as the agency accepting the volunteer services does not compensate for the services. In other words, whether a person is a volunteer is determined from the perspective of the agency receiving the services. It is of no consequence to the agency receiving the services whether a person volunteering is being paid by someone else. The person is a volunteer, as far as the agency is concerned, if the agency does not pay them.

Here, there is no evidence Mr. Grayson was compensated by Uintah County for his helicopter services. Therefore, the Court finds that Mr. Grayson could be a volunteer under the Workers Act even though he was paid by his employer Pete Martin Drilling.

III. Whether the Helicopter Defendants qualify as volunteer government workers under the Workers Act.

The final issue is whether the Helicopter Defendants were volunteer government workers under the Workers Act. Specifically, the issue is whether the Workers Act requires volunteer services to be pre-approved.

Utah Code Ann. § 67-20-4 states:

> A volunteer may not donate any service to an agency unless the volunteer's services are approved by the chief executive of that agency or his authorized representative, and by the office of personnel having jurisdiction over that agency.

Here, approval of the Helicopter Defendants' service by the Uintah County Commissioners came after the Helicopter Defendants provided the service. The Plaintiffs argue that the Workers Act requires volunteer services be approved before the service is rendered. Uintah County and the Helicopter Defendants argue that the statute does not require pre-approval, but simply requires approval of the volunteer services.

The plain language of the statute requires that the volunteer services be pre-approved. While the statute does not explicitly use the words "prior approval" or "pre-approval", the statute does indicate that a person may not volunteer unless the services are approved. That is another way of saying a volunteer services must be pre-approved. If a person cannot volunteer unless approved, logic dictates that the statute requires volunteer services be pre-approved. There would be no reason for the legislature to use language stating a "volunteer may not donate" unless prior approval was required.

Also, Uintah County argues that the Workers Act is a remedial statute designed to encourage people to volunteer. Uintah County argues that construing this remedial statute

liberally requires the Court to find that pre approval is not required. However, after the fact approval would not encourage people to volunteer. After the fact approval would likely discourage people to volunteer. The Workers Act provides a volunteer such things as workers' compensation coverage, governmental immunity from suit and volunteer experience credit. No volunteer would be encouraged to render their services if those benefits were not established for them before hand. In other words, if the benefits the Workers Act provides are the carrot that entice people to volunteer, that carrot needs to be offered before the volunteer provides the services, not after. If a volunteer is encouraged to be a volunteer government worker because of the benefit of being provided with immunity, worker's compensation, and volunteer experience credit, that benefit would need to be ensured to the volunteer before the service is rendered.

Furthermore, the parties have not given, nor is the Court aware of, any explanation of what purpose approval of a volunteer's services after the fact would serve. There is no reason this Court can imagine for the legislature to craft a statute requiring approval of volunteer services if approval after the fact was sufficient. After the fact approval leads to a situation where the agency receiving the volunteer services decides whether the volunteer should be shielded by governmental immunity in the event an injury occurs. Approval after the fact would allow the governmental agency, not a judge or a jury, to decide lawsuits after they are filed.

Throughout the pleadings dealing with this Motion, the question was raised of the practicality of getting approval for a volunteer service under emergency circumstances Simply put, that is not a question this Court has to decide. This Court merely has to use the statutes that the legislature has provided and follow them The Workers Act requires approval of the volunteer's services, in an emergency situation or otherwise, and prohibits a volunteer from

providing those services until they are approved.

Here, the Helicopter Defendants provided their services to the Uintah County Sheriff's Office before those services were approved. The statute clearly prohibits that sequence. The approval of the Helicopter Defendants' services came months after the accident, and months after the suit was filed. The Court finds that the Workers Act requires approval before the services are rendered. Therefore, the Workers Act does not apply in this situation. Consequently, there is no basis for Uintah County to intervene in this matter. Uintah County's Motion to Intervene and the Helicopter Defendants joinder in that Motion, is denied.

Finally, the Helicopter Defendants make the alternative argument that summary judgment should enter in their favor based on the loaned employee doctrine. The Helicopter Defendants argue that Brian Grayson was loaned to Uintah County and their employee. The Helicopter Defendants Motion under this alternative basis is denied for the reasons set forth by Uintah County in their Reply Memo. The loaned employee doctrine has no application to a governmental entity under Utah law. The method for becoming an employee of the government under these types of circumstances is provided for by statute. Therefore, the common law loaned employee doctrine has been preempted by statute.

Furthermore, under Utah law the loaned employee doctrine "provides that if a labor service loans an employee to a special employer for the performance of work, then the employee, with respect to that work, is the employee of the special employer for whom the work or service is performed." *Ghersi v. Salazar*, 883 P.2d 1352, 1356 (Utah 1994). The loaned employee applies when "the employee has made a contract of hire . . . with the special employer[.]" *Id.*

Here, there is no evidence that any of the involved parties made a contract for hire.

Furthermore, none of the parties could be properly characterized as a labor service. Therefore, the loaned employee doctrine does not apply. The Helicopter Defendants' alternative motion for summary judgment is denied.

Dated this 8 day of April, 2009.

BY THE COURT:

JOHN R. ANDERSON, District Court Judge

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Exhibit 2

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January 8, 2010

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Re: ***Orr v. Uintah County*; Civil No. 090800834**

Gentlemen:

I have received your motion to dismiss and memorandum dated January 3, 2010 in the above action. You sent copies to me and to a number of other counsel who do not represent parties to Orr v. Uintah County, pursuant to our special appearances, and I thank you for your courtesy.

Your motion and memorandum contain a misstatement which I assume to be inadvertent, and which is not necessary to your motion, but which may potentially mislead Judge Payne with respect to the separate action of Orr v. Grayson, Civil No. 070800045, which is also assigned to Judge Payne, and in which my clients Brian Grayson, Pete Martin Drilling, Inc. and Rat Air, Inc., are defendants.

The misstatement is this: At page 3 of your motion and memorandum, you state that in Judge Anderson's ruling and order of April 8, 2009, in Orr v. Grayson, he concluded that Pete Martin Drilling, Inc., Rat Air, Inc., and Brian Grayson were not volunteers under either the Utah Volunteer Services Act or Volunteer Government Workers Act. This statement is incorrect because Judge Anderson's ruling and order did not deal with the Utah Volunteer Services Act[1] but only with the Volunteer Government Workers Act[2].

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[1] Utah Code Ann. §63-30b-1 et. seq., now remembered as §63G-8-101 et. seq.
[2] Utah Code Ann §67-20-1 et. seq.

In Orr v. Grayson, the County's motion, in which my clients joined, was to substitute the County as a defendant based on my clients' volunteer status under the Workers Act. Judge Anderson denied that motion. The County's motion and my clients' joinder did not raise the issue of the separate Services Act.

Your motion and memorandum are correct in paragraph 4 that my clients raised their volunteer status as a defense under both the Services Act and the Workers Act in their answer in Orr v. Grayson. My clients intend to defend themselves at trial on the basis of immunity under the Services Act, as well as other defenses.

Your misstatement that Judge Anderson's ruling pertained to the Services Act may incorrectly inform Judge Payne that the Services Act will not be available as a defense for my clients at trial.

For this reason, it is important that you immediately file a correction to your motion and memorandum in which you clarify that the Services Act was not before Judge Anderson and he did not address it in his ruling.

If for any reason you are not able to file and serve this correction immediately, please notify me so I can take necessary action. Thank you for your cooperation.

Yours very truly,

STRONG & HANNI

ROGER H. BULLOCK

RHB/cas
cc: Loni DeLand
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Attorneys for Uintah County, Utah

EIGHTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY

STATE OF UTAH

CLAUDIA ORR and EUGENE ORR, individually, on behalf of their deceased son, KEVIN ORR, HOLLY ORR, individually and on behalf of the estate and heirs of KEVIN ORR, Plaintiffs, **vs.** UINTAH COUNTY, STATE OF UTAH Defendant.	**UINTAH COUNTY'S COMBINED REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND MEMORANDUM IN OPPOSITION TO MOTION TO CHANGE VENUE** Civil No. 090800834 Judge A. Lynn Payne **ORAL ARGUMENT IS REQUESTED**

Uintah County, Utah hereby submits this *Memorandum* both in further support of its *Motion to Dismiss* and in opposition to Plaintiffs' *Motion to Change Venue*.

ARGUMENT

In its opening *Memorandum*, Uintah County argued that because Plaintiffs had a full and fair hearing in *Orr I* on the issue of Pete Martin Drilling, Inc., Rat Air, Inc. and Grayson's ("Helicopter Defendants") status as volunteers the doctrines of *res judicata* or *collateral estoppel* preclude Plaintiffs from commencing this new action *Orr II* in hopes of obtaining a different result. *See City of Des Moines v. $81,231*, 943 P.2d 669, 675-76 (Wash. App. 1997)(Dismissing second filed lawsuit even though prior action between parties was on appeal and had not yet resulted in a final judgment). In their opposition *Memorandum*, Plaintiffs never responded to this argument.

In its opening *Memorandum*, Uintah County likewise argued that the *law of the case* doctrine precluded this lawsuit because Judge Anderson had decided the same issue in *Orr I*. *See Gage v. Gen'l Motors Corp.*, 796 F.2d 345, 349-50 (10th Cir.1986)(applying *law of the case* doctrine with respect to a state Court's factual/issue determination to a subsequent federal court proceeding involving the same parties). In their opposition *Memorandum*, Plaintiffs never addressed this argument.

In its opening *Memorandum*, Uintah County argued that Judge Anderson's *Ruling* in *Orr I* also triggered the doctrine of *comity* which means that one District Court judge

cannot overrule another District Court judge of equal authority. *See Long v. City & Cnty. of Honolulu,* 665 P.2d 157, 162 (Hawaii 1983)(Unless *cogent* reasons support the second court's action, any modification of a prior ruling of another court of equal and concurrent jurisdiction will be deemed an abuse of discretion). In their opposition *Memorandum*, Plaintiffs ignored this argument, too.

Finally, in its opening *Memorandum*, Uintah County argued that this second lawsuit on the same issues was precluded by the *First Filed Rule*, which provides that when two lawsuits have been filed involving the same subject matter and/or issue, the Court in which the second filed suit is pending lacks subject matter jurisdiction to decide the matter. *See Nielson v. Scchiller*, 66 P.2d 365, 368 (Utah 1937)("Where two actions between the same parties . . . to test the same rights are brought in courts having concurrent jurisdiciton, the court which first acquires jurisdiction . . . retains its jurisdiction . . . and no court of coordinate power is at liberty to interfere with its [the first court's] actions"). In their opposition *Memorandum*, Plaintiffs never mentioned this argument.

Instead of responding to the foregoing arguments,[1] Plaintiffs contend that rather than dismissal, this case should be stayed in the event an appellate court finds that Judge Anderson erroneously concluded that the Helicopter Defendants were not government workers or the jury in *Orr I* finds that the Helicopter Defendants were volunteer services providers so as to in effect make them County employees for purposes of Plaintiff's claims. Based on these contentions, Plaintiffs ask that the *Motion to Dismiss* be denied and that this case be stayed until *Orr I* is brought to a final conclusion. Plaintiffs also contend that venue should be changed. Plaintiffs even ask to have this case transferred back to Salt Lake County from whence it had originally been transferred to Uintah County for lack of proper venue!

Plaintiffs insist that venue should be changed because they will be severely prejudiced if they have to litigate claims against Uintah County in Uintah County. These arguments all fail under the doctrine of *res judicata* and the *one action rule* both of which prevent splitting causes of action.

With respect to the possibility that Judge Anderson's *Ruling* in *Orr I* will be reversed on appeal, that does not appear to be possible. Judge Anderson's *Order* denying

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[1] Because Plaintiffs never responded to the foregoing arguments, these points of law are conceded. . *See U.S. v. Garcia*, 52 F.Supp.2d 1239, 1253 (D. Kan. 1999); *Super Film of America v. UCB Films*, 219 F.R.D. 649, 660 (D. Kan. 2004); *Hinsdale v. City of Liberal, Kansas*, 19 Fed. Appx. 749, 768, 2001 WL 980781 (10th Cir. 2001).

Uintah County's *Motion to Intervene* was entered April 10, 2009. An order denying intervention is a collateral order subject to immediate appeal. *See Dickinson v. Peteroleum Conversion Corp.*, 338 U.S. 507, 573 (1950); *United States v. City of Oakland, California*, 958 F.2d 300 (9th Cir. 1992). Since no appeal was taken from that *Ruling* within the 30 days required under *Utah Rule of Appellate Procedure* 4, an Appellate Court would not have jurisdiction to consider the matter. The same finality would be accorded any jury decision in *Orr I* finding that the Helicopter Defendants were in fact providing voluntary services so as to be considered County employees.

This result would be the product of the *one action rule* which prohibits splitting causes of action. This rule requires that all negligence claims arising out of one occurrence must be determined in one action. In other words, when there is an identity of facts and evidence, all claims arising out of an accident must be brought in one suit. *See Macris & Associates, Inc. v. Neways, Inc.*, 16 P.3d 1214, 1220 (Utah 2000).

One purpose of the rule against splitting causes of action is to prevent multiple lawsuits on a single cause of action. The *one action rule* differs from *res judicata* in that *res judicata* requires an identity of parties whereas the *one action rule* does not. *See Diderich v. Yarnvbich*, 196 P.3d 411, 421 (Kan. 2008). Both *res judicata* and the *one action rule*, however, require a prior judgment. Consequently, once a judgment is entered in *Orr I*, regardless of who prevails all other claims, even claims against Uintah County

that Plaintiffs may have had arising out of the death of Detective Orr, merge into that judgment and are barred.

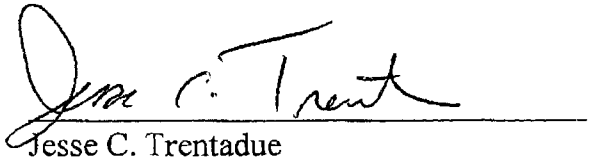
Simply put, there is nothing left to litigate by Plaintiffs with respect to Uintah County and the death of Detective Orr. Since those claims do not or will not exist, there is nothing to be gained by a stay and no need to transfer venue.

CONCLUSION

For the reasons above stated, Plaintiffs' *Complaint* in *Orr II* should be dismissed with prejudice. Simply put, the issue of Peter Martin Drilling, Inc., Rat Air, Inc. and Bryan Grayson's status as County employees and Uintah County's potential liability to Plaintiffs should these Defendants be found to be volunteers/employees was resolved or will be resolved in *Orr I*.

DATED this 28th day of January , 2010.

SUITTER AXLAND, PLLC



Jesse C. Trentadue

UINTAH COUNTY ATTORNEY'S OFFICE
John H. Gothard, Jr.
Deputy County Attorney
Attorneys for Uintah County, Utah

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2010 a corrected copy of foregoing **MEMORANDUM** was served by the method indicated below, to the following:

✓Joseph W. Steele SIEGFRIED & JENSEN 5664 South Green Street Salt Lake City, UT 84123	( ) ( ) ( ) ( )	(x) U. S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
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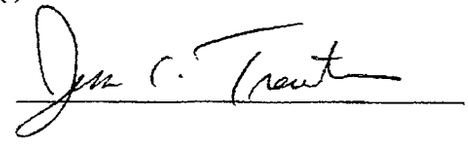
✓Loni F. DeLand ATHAY & DELAND 43 East 400 South Salt Lake City, UT 84111	( ) ( ) ( ) ( )	(x) U. S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Richard A. Van Wagoner Robert H. Harrison SNOW, CHRISTENSEN & MARTINEAU 10 Exchange Place, Suite 1100 P.O. Box 45000 Salt Lake City, UT 84145	( ) ( ) ( ) ( )	(x) U. S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Mary A. Wells Wells, Anderson & Race, LLC 1700 Broadway, Suite 1020 Denver, CO 80290	( ) ( ) ( ) ( )	(x) U. S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
✓Roger Bullock STRONG & HANNI 3 Triad Center, Suite 500 Salt Lake City, UT 84180	( ) ( ) ( ) ( )	(x) U. S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile



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IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR UINTAH COUNTY, STATE OF UTAH

Claudia Orr and Eugene Orr, individually, on behalf of their deceased son, Kevin Orr, Holly Orr, individually and on behalf of the estate and heirs of Kevin Orr, Plaintiffs, vs. Uintah County, State of Utah, Defendant.	RULING AND ORDER ON DEFENDANT'S MOTION TO DISMISS Case No. 090800834 Judge A. LYNN PAYNE

At the hearing on the Motion to Dismiss (on March 16, 2010), the Court agreed to delay ruling on this matter until Judge Anderson ruled on an issue previously decided in Orr I; i.e. whether the Defendants in Orr I qualified as volunteers under the Volunteer Service Act, Utah Code Ann. § 63G-8-101. Based upon the pleadings in this matter concerning the Motion to Dismiss, the Court was under the impression that Uintah County had raised the issue of whether the Defendants qualified as volunteers in its motion to intervene in Orr I. The Court has reviewed the issues which Uintah County raised in its motion to intervene. Uintah County did not raise the issue of the Volunteer Service Act in its motion to intervene. Indeed, Uintah County's pleadings clearly state that they were not seeking to intervene on the basis of the Volunteer Service Act. Therefore, there is no pending issue for Judge Anderson to rule on. Furthermore, the Court cannot ask Judge Anderson to rule on an issue not raised in the motion to

intervene. Therefore, the Court will now rule on the Defendant's Motion to Dismiss.

The Defendant offers a number of reasons why the case should be dismissed. The Court finds that it is sufficient to dismiss this case based on Rule 12(b)(6). A Rule 12(b)(6) defense is a claim that the Plaintiff has failed to state a claim upon which relief can be granted. The Rule 12(b)(6) defense is a challenge to the plaintiff's right to relief based on the facts the plaintiff has alleged in the complaint. *Russell v. Standard Corp.*, 898 P.2d 263 (Utah 1995).

Here, the Plaintiffs' first two claims ask the Court to enter an order declaring the Helicopter Defendants (Grayson, PMD and Rat Air) not immune under the Volunteer Worker's Act., and under the Volunteer Service Act. Grayson, PMD and Rat Air are not parties to this matter. Furthermore, Grayson, PMD, and Rat Air are defendants in Orr I which concerns the same facts as this case. Any claims or defenses against these defendants should have been raised in Orr I. Therefore, the Court cannot grant the Plaintiff's requested relief as to those two claims.

The Plaintiffs' third claim states that if a court finds Grayson, PMD and Rat Air to be volunteers under the Volunteer Worker's Act, the Plaintiffs are entitled to recover their damages from Uintah County. The Plaintiffs do not indicate how they are entitled to recover their damages from Uintah County. The Plaintiffs do not allege that Uintah County, its agents or employees acted negligently or grossly negligent.

Frankly, the Plaintiffs' reason for initiating this action is to create a fall back in the event that they are unsuccessful in Orr I. If the Plaintiffs wanted to bring a claim against Uintah County, a claim that arose from the same facts and circumstances as those in Orr I, they should have stated their claim in that case. As such, this case is merely a hollow case, kept open in the event the Plaintiffs do not succeed in Orr I. The claim is uncertain and fails to specify the cause

of action. The claim is contingent on the outcome of Orr I. Consequently, the Plaintiffs failed to state a claim upon which relief can be granted.

The Defendant's Motion to Dismiss is granted.

Dated this 20 day of April, 2010.

BY THE COURT:

A. LYNN PAYNE, District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 090800834 by the method and on the date specified.

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Date: 4-21-10

Jo Roberts

Deputy Court Clerk